SUPREME COURT, U.S.
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1970~~ 70-205

MONROE CAINE, KENNETH FINO and DAVID RATKE,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 27, 1971.

Citation to Opinion Below

The opinion of the Court of Appeals is printed in Appendix, A, *infra*, pages A1-A7, and has not been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 27, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether under the Fifth and Sixth Amendments to the United States Constitution an indictment may employ the words "among others" as a means of granting the prosecution the power to enlarge upon and add new and additional charges of fraud at a trial.

2. Whether a Court of Appeals can make a finding of fact of what the Grand Jury most likely believed and what decisions the Grand Jury made separate from the language in the indictment.

Statutes Involved

There are here involved the Fifth Amendment and the Sixth Amendment to the Constitution of the United States. The constitutional provisions are printed in Appendix B, *infra*, page B-1.

Statement

On June 20, 1967, the petitioners were indicted, on 85 counts, for alleged violations of 18 U. S. C. §1343 and 18 U. S. C. §1341. Each count of the indictment charged that the petitioners devised a scheme to defraud for the purpose of obtaining money by means of false and fraudulent representations, to induce the purchase of an automotive accessory product. Petitioners were found guilty by a jury on 72 counts of the indictment, and judgments of conviction were entered in the United States District Court for the Southern District of New York. Petitioners Caine and Ratke were each sentenced to four years in prison on each count and fined $2,000.00 plus one-third of the costs of prosecution. Petitioner Fino was sentenced to one year in prison and fined $1,000.00 on each count plus

one-third of the costs of prosecution. The prison sentences are to run concurrently.

The indictment herein, charges that the petitioners advertised and sold an automobile accessory product which was claimed to be effective in accomplishing gasoline savings. The indictment charges that the petitioners issued advertising material which contained false and fraudulent representations for their product.

Paragraph 4 of the indictment sets forth the specific representations which the Grand Jury charged to be false and fraudulent. Twelve specific representations are set forth and lettered from A to L in paragraph 4 of the indictment. Paragraph 4 of the indictment also contains the words "among others" prior to setting forth the twelve specific charges of alleged fraud (8a-9a).*

The petitioners thereafter requested and received a Bill of Particulars from the government, wherein the petitioners requested the specific references in the advertising material, which the government claimed constitutes the false and fraudulent representations. The Bill of Particulars sets forth the quotations from the advertising material which were alleged to be false and fraudulent (25a-28a).

During the trial, the government attempted to introduce evidence of a new issue of alleged fraud. The government attempted to introduce evidence that the petitioners, in their advertising material, represented that a refund would be made to the purchaser if he was not fully satisfied. The government attempted to raise an issue that this representation was false and fraudulent. The petitioners objected to the introduction of such evidence as being preju-

* References to "a" pages refer to petitioners' appendix to the Court of Appeals which was filed with this Court for use on this proceeding.

dicial and improper, in that it was not raised in the indictment nor included in the Bill of Particulars (36a-38a).

The government contended that it could raise this additional issue because paragraph 4 of the indictment contains the words "among others," wherein the Grand Jury set forth the specific representations which were charged to be false and fraudulent.

The Trial Judge at first sustained the petitioners' objection and ruled that the government could not inject this new issue into the case (47a). Upon further request of the government, the Trial Judge reversed his ruling and held that the government could introduce this new issue of alleged fraud because of the inclusion in the indictment of the words "among others" (54a).

The issue of refunds thereupon became the major issue at the trial. The government used 16 witnesses to testify on this issue of alleged fraud. In fact it became an inflammatory issue to the jury. Extensive evidence was introduced of the alleged failure to make refunds after repeated requests.

The Court of Appeals affirmed the judgment of conviction and held that it was not error to permit the injection of the new issue of alleged fraud at the trial.

Reasons for Granting the Writ

Petitioners respectfully submit that certiorari should be granted in that basic constitutional questions are presented involving the right of a defendant to be accused of a felony on the basis of a Grand Jury indictment. We are considering a question which involves the impermissible delegation of authority to the prosecution to enlarge the charges in an indictment. We are also considering the

constitutional right of a defendant to be informed of the charges against him.

The instant case is one of significant public importance in that it presents recurring questions which have been considered by the Lower Courts, but never resolved by this Court. Indictments similar to the indictment in the instant case have heretofore been issued and undoubtedly will be issued in the future unless a clear and definitive ruling is laid down by this Court. We are considering basic questions involving the function of the Grand Jury, the function of an indictment, and the powers of the prosecution in criminal proceedings.

The Court of Appeals attempted to answer the constitutional questions raised herein. Petitioners submit that the rulings by the Court of Appeals are in error.

The Court of Appeals has not directly responded to the question of whether the use of the words "among others" in the indictment constitutes the vehicle or means by which there is an improper and impermissible delegation of authority to the prosecution to enlarge the charges contained in the indictment. Rather than meet this constitutional question directly, the Court of Appeals has attempted to remove the issue by making findings of fact which are completely conjectural and without any basis in fact.

Thus, the Court of Appeals poses the issue of whether there is assurance in the instant case that the petitioners were not convicted of charges either rejected or not considered by the Grand Jury. The question posed by the Court of Appeals is a proper one, but the disposition of this question by the Court of Appeals is based upon a completely fallacious finding of fact.

The Court of Appeals has made findings of fact which are not indicated in, or supported by, the indictment itself.

There is no other source which the Court of Appeals conceivably could have used to look into the minds of the Grand Jury and make the findings of fact which it has herein made to dispose of this basic constitutional question. Thus, the Court of Appeals finds and states that the Grand Jury's failure to mention fraud with respect to refunds was most likely due to the belief by the Grand Jury that it would be redundant to do so. The Court of Appeals makes a second finding of fact that, given the substantial evidence mustered on the point at the trial, it is "particularly unlikely" that the Grand Jury consciously rejected such a charge.

Petitioners submit that the Court of Appeals does not have the power to make findings of fact, as to what the Grand Jury did; as to what the Grand Jury decided; or what was in the minds of the Grand Jury; except as indicated and set forth in the indictment itself.

Petitioners further submit that the findings of fact made by the Court of Appeals are most questionable and in fact are not supported by the decisions which were made by the Grand Jury, as set forth in the indictment.

The Grand Jury specified and set forth twelve specific charges of fraud in the instant case. The essence of fraud in this case is the charge that a false representation was made with knowledge that it was false when made. The Court of Appeals would have us accept, as a finding of fact, that the Grand Jury made twelve specific charges as set forth in paragraph 4 of the indictment, and did not include a charge with respect to refunds because they considered that it would be redundant, and intended to include it in the phrase "among others."

A mere reading of the twelve charges which were in fact set forth by the Grand Jury, raises serious questions

as to the basis of the Court of Appeals to state that the issue of refunds was considered redundant by the Grand Jury. First, the Court of Appeals itself states in its opinion that there was substantial evidence mustered on the issue of refunds at the trial. In point of fact, the issue of refunds was the major issue at the trial. But considering the indictment itself, we find that very minor and rather inconsequential charges are specifically set forth as the charged fraud in this case. Thus, paragraph 4 of the indictment includes charges that there are false and fraudulent claims that the Unitron would convert the hydrocarbon atoms in gasoline into a new source of power; that the Unitron would eliminate one of the greatest causes of lost hydrocarbon power; and that the Unitron principle in action had a relationship to zero resistance theories.

Can we properly state, as the Court of Appeals did, that the Grand Jury considered it significant and important to make these four charges, but considered it redundant to make the far more significant and material charge that there was a representation that refunds would be made, but that said representation was false and fraudulent? It most certainly was of greater significance for the purchaser, and most certainly it would appear to have had greater significance to the Grand Jury, to consider a representation wherein a refund was promised, if such a promise was fraudulently made, as distinguished from a representation or promise that the Unitron principle in action had a relationship to zero resistance theories, or that the Unitron would convert hydrocarbon atoms in gasoline into a new source of power.

Petitioners submit that not only does the Court of Appeals lack the power to make findings of fact as to what was in the minds of the Grand Jury, but that the findings of fact which the Court of Appeals did make, are wholly without substantiation and in fact are contrary to

any reasonable construction or interpretation of what the Grand Jury has in fact done in the indictment in this case.

The second finding of fact set forth by the Court of Appeals is equally fallacious and without proper substantiation or support. The Court of Appeals found that it is "particularly unlikely" that the Grand Jury rejected the charge with respect to refunds in view of the large amount of evidence that was submitted upon this issue at the trial. This finding of fact is most certainly the flimsiest gossamer upon which a guilty conviction in a criminal case can conceivably be sustained. The fact is that the Grand Jury did not make a charge of fraud with respect to an alleged false representation relative to the giving of refunds. The fact is that the very argument submitted by the Court of Appeals for its finding of fact, equally supports a contrary finding. Given the substantial amount of evidence on this issue, it is more likely that the Grand Jury did consider this issue and therefore rejected it by the very fact that it did not include it in the indictment.

Most certainly, the Court of Appeals cannot have it both ways. On the one hand, the Court of Appeals found that the Grand Jury did not include the charge relative to refunds because the Grand Jury most likely believed that it would be redundant; and, on the other hand, found that there was substantial evidence on this issue and therefore the Grand Jury probably or most likely did not reject it.

Petitioners submit that the argument submitted by the Court of Appeals leads us to the reverse conclusion if we were properly in a position to reach any conclusion as to what was in the minds of the Grand Jury and what decisions the Grand Jury made, separate and apart from the charges set forth in the indictment.

Petitioners submit that the use of the words "among others" in the indictment can only be treated as surplusage.

Any other construction for such language would open the door to provide for an impermissible delegation of power to the prosecution to enlarge the charges which were made by the Grand Jury. A defendant could be convicted of a charge which was either not considered by the Grand Jury, or if considered by the Grand Jury, might have been rejected by it.

Petitioners respectfully submit that they have been deprived of their constitutional right to be accused of a felony on the basis of a Grand Jury indictment. The Court of Appeals has not directly discussed this question. The only assumption that can be made, is that the Court of Appeals is in effect holding that the charge of fraud with respect to refunds is included in and made by the Grand Jury through the use of the words "among others." Petitioners submit that the constitutional right of an accused is not fulfilled by the use of such broad and ambiguous language as that which was employed in the instant indictment. The constitutional protection would become meaningless if an indictment can be phrased using language such as "among others" in charging the commission of a felony.

The next issue posed herein involves the basic right of an accused to be informed of the charges against him and thus to prevent surprise at the trial. With respect to this issue, the Court of Appeals made various findings of fact. Petitioners submit that the findings of fact which were made by the Court of Appeals are not valid and, in fact, were not even made by the District Court in support of its ruling permitting the injection of the issue of refunds in the instant case.

The petitioners submitted a demand for a Bill of Particulars upon the government in which request was made that the government set forth those portions of the advertisements which allegedly constitute the false representa-

tions which are charged to be fraudulent in the instant indictment. Although a Bill of Particulars cannot cure the defect in the instant indictment, it is significant that when the government submitted its answer to the Bill of Particulars and set forth the portions of the advertisement which it claimed constitute the false representations herein, the government's answers did not include any reference to any statement in the advertisement relative to the question of refunds.

The refund issue, as heretofore indicated, became the major issue in the instant case, in which the government used 16 witnesses and which consisted of highly emotional testimony from witnesses flown in from all over the country. The Court of Appeals, however, found that the injection of this issue did not constitute a surprise. The Court of Appeals set forth various alleged findings of fact in support of this conclusion. Thus, the Court of Appeals states that an earlier employed defense counsel was verbally advised that the government planned to raise the refund issue. The Court of Appeals next found that the introduction of refunds could hardly have constituted a surprise in view of the fact that the petitioners "had in readiness" 7,000 refund checks to show their good faith, and further, that the petitioners found several witnesses to testify in their behalf on this issue.

Once again, to attempt to meet and dispose of the serious and basic questions presented herein, the Court of Appeals has made findings of fact for which there is no valid basis. The finding made by the Court of Appeals that it appears that an earlier employed defense counsel was advised by the government that the refund issue would be made, is a question that was disputed before the District Court and, in fact, the earlier defense counsel himself was brought to Court to deny this assertion. Furthermore, this issue

was not resolved in light of the fact that the question was clearly drawn that the District Court was not making its ruling based upon any premise that earlier defense counsel was verbally told that the issue would be raised. Based upon this record, the Court of Appeals could not make a finding that there was no surprise because of alleged verbal advice to an earlier defense counsel. Second, the Court of Appeals made a finding that there could hardly have been surprise since the petitioners were able to introduce certain evidence in response to the new issue. The fact is that the petitioners were very surprised and unable to properly prepare for this new and major issue of alleged fraud. The 7,000 refund checks were among the corporate records which the government had earlier subpoenaed and had in its possession. At the trial petitioners asked the government to produce the records which had been subpoenaed and introduced the corporate records of 7,000 refund checks at the trial. The witnesses whom petitioners obtained to testify in their behalf, on this issue, were two former employees who were contacted at midnight during the trial, to offer testimony contrary to the government's offer of proof.

Petitioners submit that the Court of Appeals has no valid basis for making a finding of fact that there was no surprise because the petitioners were able to submit evidence on the issue. The petitioners were surprised and not prepared with respect to this issue, irrespective of the contention of the Court of Appeals that evidence of the lack of surprise is indicated by the failure to request a continuance. The case was on trial and petitioners considered the ruling by the District Court to be improper. Furthermore, a continuance cannot and could not cure the wrong herein where the phrase "among others" was being used as the umbrella for the introduction of a new issue at

the trial. In fact, this same wrong was further magnified by the introduction of another issue during the trial. A request for continuances would not constitute any cure for these rulings by the District Court.

The instant action was a complex and extensive action, involving a large number of specific charges of fraud. The introduction of a new and major issue during the trial was seriously prejudicial to the petitioners. Petitioners submit that the rule of law laid by the Court of Appeals relative to the issue of the right of an accused to be informed of the charge against him and to prevent surprise at the trial, is an improper one. The rule of law should not be that surprise is premised upon whether the accused is able to present any evidence on his behalf once a new issue is injected at a trial. The rule of law should not be premised upon conjecture on the part of the Appellate Court as to the extent of the evidence which the petitioner introduced, to determine whether or not prejudical surprise was present.

Petitioners respectfully submit that an important constitutional question is presented herein as to whether the instant indictment, in employing the language "among others" as the basis for the introduction of a new charge of criminal fraud, meets the constitutional requirement that a defendant has a constitutional right to be accused of a felony on a basis of a Grand Jury indictment, and that the Grand Jury cannot delegate to the prosecution the power to enlarge the charges which are in fact made in the indictment.

In *United States* v. *Pope*, 189 F. Supp. 12 (S. D. N. Y., 1960) the Court considered a question similar to the one posed herein. In the *Pope* case the indictment contained the words "among other things." The Court granted a

motion to strike these words in that it constituted an impermissible delegation to the prosecution, of authority to enlarge the charges contained in the indictment. The Court there stated:

> "A specific charge made by the grand jury may itself fail for lack of proof and yet, if the prosecution may augment the charges under the all-inclusive 'among other things,' the defendants may finally be prosecuted and convicted on charges of falsity in the statements not considered by the grand jury or, if considered, may have been rejected by it." Id. at 26

The Court of Appeals in the instant case attempts to distinguish the ruling in the *Pope* case by stating that a motion was made in the *Pope* case to strike the objectionable language, whereas a similar motion was not made in the instant case. The Court of Appeals states that we are therefore faced with a different question because of the absence of such a motion.

Petitioners submit that the Court of Appeals is in error. Whether or not a motion is made attacking the objectionable language, there can be no alteration or change in the constitutional question as to whether such language is proper in an indictment. If a motion is not made, such as in the instant case, then the language "among others" can only be considered surplusage. Such language cannot become constitutionally acceptable simply because a motion is not made before the trial.

This very question existed in the case of the *United States* v. *Varner,* 283 F. 2d 900 (7th Cir. 1963). In the *Varner* case the Court of Appeals considered the language "or other reasons," and the Court held that such language was surplusage and would be treated as such. In the *Var-*

ner case no motion was made addressed to the objectionable language and the question was considered on appeal. The Court, in the *Varner* case, reversed the judgment of conviction and ruled that a judgment for acquittal should have issued. In the instant case the constitutional question as to the propriety of the language in the indictment of the words "among others" can in no way be changed, altered, or attain different significance simply because a motion is, or is not made attacking the objectionable language.

Petitioners submit that the Court of Appeals is in error in attempting to draw the legal distinction that has here been drawn. There can be no question but that the basis for the introduction of evidence upon the new issue of alleged fraud, relative to refunds, was premised upon the fact that the indictment contained the words "among others." This was the specific basis which the District Court used for its ruling and this specific basis and issue was clearly drawn at the time the question was discussed at the trial when petitioners objected to the introduction of evidence with respect to the newly raised issue.

The Court of Appeals, as an additional alleged basis for the admissibility of the new issue, states that the evidence in question was legally admissible for at least some purposes, e.g., with respect to the issue of appellants' fraudulent intent. Petitioners submit that this ruling by the Court of Appeals is in error.

The issue in this case is not whether some other statement in the advertisement was false and fraudulent. The issue in this case is whether the statements charged by the Grand Jury to be false and fraudulent were, in fact, false and fraudulent. The government cannot introduce 50 other sentences in the advertisement, and introduce evidence that those other statements are false and fraudulent, for the purpose of showing that the representations

charged by the Grand Jury to be false and fraudulent were, in fact, false and fraudulent. Proof that other statements in the advertisement were false and fraudulent cannot be the basis for proving that the statements in issue in this indictment were false and known to be false when made. Petitioners submit that the evidence which was permitted to be introduced with respect to refunds, most certainly was calculated to, and undoubtedly did, influence the jury to a very material extent in the instant case, and that was precisely the wrong which was herein committed.

Petitioners respectfully submit that the constitutional questions herein presented should be resolved, and that settlement thereof is in the public interest. These questions are of a recurring nature and involve the form and nature of criminal indictments and their compliance with the requirements of the Fifth and Sixth Amendments to the United States Constitution. The questions here presented have not been ruled upon by this Court and petitioners respectfully submit that it would be in the public interest to have these questions resolved at this time.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: May 21, 1971

Respectfully submitted,

MILTON A. BASS,
ROBERT ULLMAN,
Counsel for Petitioners.

APPENDIX A

Opinion of United States Court of Appeals For the Second Circuit

Decided April 27, 1971

Before: WATERMAN, MOORE and FEINBERG, *Circuit Judges.*

FEINBERG, Circuit Judge:

Monroe Caine, Kenneth Fino and David Ratke appeal from convictions of violating the federal mail and wire fraud statutes, 18 U. S. C. §§1341, 1343. Appellants were found guilty on 72 counts of an 85-count indictment after a 12-day jury trial in the United States District Court for the Southern District of New York before Walter R. Mansfield, J. Caine and Ratke were each sentenced to concurrent four-year prison terms and were fined $2,000 plus one-third of the costs of prosecution. Fino received concurrent one-year terms and a $1,000 fine, and was ordered to pay one-third of the prosecution costs.

The federal mail and wire fraud statutes provide, in relevant part, criminal sanctions against persons who, "having devised or intending to devise any scheme or artifice to defraud," use the mails or interstate telegraph facilities in furtherance of such a scheme. A short outline of the fraudulent scheme in the present case, as the jury was entitled to find it, is as follows. Defendants formed the Sperry Dynamics Corporation in 1964 in order to market the "Sperry Unitron," a device for increasing gasoline mileage in automobiles. The corporation embarked on a massive advertising campaign, replete with exorbitant and unjustified claims for its product. The advertisement stated, for example, that the Unitron was a "new invention by one of America's leading scientists (co-developer of synthetic tires and power brakes)," although the inventor was relatively unknown and appar-

ently worked out of a "laboratory" in his garage. Similarly, the advertisement stated that laboratory tests had proved that the Unitron would enable the purchaser to get up to 33 to 37 miles per gallon, while both appellant-initiated and other tests showed that the Unitron provided no real improvement in fuel economy.

The advertisement contained errors of omission as well as those of commission. There was no mention that the Unitron was actually a can of engine detergent which needed to be replaced with every tankful of gas rather than a solid device which would not need replenishment. Nor did the advertisement indicate that the solid instrument shipped along with the fluid was merely a standard gasoline filter.

Finally, there was evidence of fraud in appellants' administration of the enterprise. Customers failed to receive their Unitron, even after their checks were deposited in Sperry's account, and they wrote up to nine complaint letters. Likewise, many claims for refunds were never satisfied.

I

Appellants' primary challenge to their convictions is that the court improperly permitted introduction of evidence that Sperry had failed to give refunds as promised in its advertisement. The issue arose early in the trial when the Government attempted to have a witness testify that, although he had returned the Unitron as instructed in the advertisement, he had never received a refund. Defense counsel objected and a lengthy colloquy ensued. Defense counsel argued that neither the indictment nor the bill of particulars charged the failure to pay refunds as a part of the fraudulent scheme. After discussion of various practical considerations, some of which will be

mentioned below, the court ruled such evidence admissible under the following language of the indictment:

> It was further a part of said scheme . . . that the said advertising, as the defendants well knew, would contain false, fraudulent and misleading statements . . . including *among others*. . . . [Emphasis added.]

Thereafter, many government witnesses testified that they had not received refunds.

Citing United States v. Pope, 189 F. Supp. 12, 25-26 (S. D. N. Y. 1960), appellants contend in this court that the admission of the evidence respecting refunds requires reversal. In *Pope*, the defendant moved to strike the words "among other things" from an indictment, and the court granted the motion. It reasoned that the words constituted an impermissible delegation to the prosecution of authority to enlarge the charges contained in the indictment:

> A specific charge made by the grand jury may itself fail for lack of proof and yet, if the prosecution may augment the charges under the all-inclusive "among other things," the defendants may finally be prosecuted and convicted on charges of falsity in the statements not considered by the grand jury or, if considered, may have been rejected by it.

Id. at 26. Appellants claim that the same rationale should govern here.

In reply, the Government distinguishes *Pope*. It points out that the indictment in that case charged the making of false statements in proxy solicitations and reports to the Securities and Exchange Commission, while the gist of the

charge against these defendants is the devising of a *scheme* to defraud made criminal when the mails or interstate wires were used to pursue it. Viewing the failure to make refunds as only one of the many ways in which the scheme was carried out, the Government contends that the specification in the indictment here of certain means of carrying out the scheme did not preclude proof of others under the "among others" language. The Government also claims that the very judge who decided *Pope* recognized this distinction in United States v. Mayo, 230 F. Supp. 85 (S. D. N. Y. 1964).

The Government's argument is not without force, but we need not decide whether it would carry the day. The holding of *Pope* was that the surplus language there should be stricken from the indictment. Even if we were to agree that the district court in this case could properly have stricken "among others" from the instant indictment on the authority of *Pope*, no such motion was made. We are faced instead with the different question whether, absent such a motion, the admission at trial of evidence as to refunds requires reversal of appellants' convictions. We conclude that it does not.

The decision in *Pope* appears to have had two bases. First, it was an effort to protect a defendant from being surprised at trial by evidence on charges for which he had justifiably not prepared. In the present case, however, appellants can hardly claim that introduction of evidence concerning refunds constituted "surprise," much less prejudicial surprise. Rather, appellants themselves had in readiness 7,000 refund checks to show their good faith and found several witnesses to testify in their behalf on this issue. Likewise, it appears that the Government

verbally advised earlier employed defense counsel that it planned to raise the refund issue. Finally, the absence of surprise is highlighted by appellants' failure to request a continuance when the court ruled the evidence admissible.

The second basis of the holding in *Pope* was to assure that a defendant is not convicted of charges either rejected or not considered by the grand jury. In the present case the grand jury obviously considered defendant's entire advertisement, and listed 12 of the false advertising claims in addition to using the phrase "among others." The grand jury's failure specifically to mention fraud with respect to refunds was most likely due to the belief that further spelling out of defendants' fraudulent scheme was redundant. Given the substantial evidence mustered on the point at trial, it is particularly unlikely that the grand jury consciously rejected such a charge. Cf. United States v. Silverman, 430 F. 2d 106, 109-12 (2d Cir. 1970). Furthermore, it is clear that the evidence in question was legally admissible for at least some purposes, e.g., with respect to the issue of appellants' fraudulent intent. See, e.g., United States v. Kaplan, 416 F. 2d 103 (2d Cir. 1969); United States v. Deaton, 381 F. 2d 114, 117-18 (2d Cir. 1967).

On this record and in this procedural context, we hold that the admission of evidence concerning appellants' failure to pay refunds as advertised was not reversible error. Consonant with our discussion above, we expressly limit our holding to the facts of the present case.

II

Appellants' other arguments do not merit extended discussion. Appellants challenge the trial court's charge

to the jury on the ground that it failed adequately to emphasize that they must knowingly have made false representations and "[i]n effect . . . equated false and misleading representations with fraud. . . ." A brief summary of the relevant portions of the court's charge belies this contention. The court first stated that:

> In order to find a defendant guilty . . . you must first find with respect to each count that the government has established beyond a reasonable doubt, first, that the defendant wilfully, knowingly and intentionally devised or became a party to the alleged scheme or artifice to defraud.

It then proceeded to define a scheme to defraud but soon thereafter thoroughly stated the content of the necessary finding:

> Intent to defraud means an intent and purpose to deceive others. A fraudulent intent of course cannot be presumed. If you found that any untrue representations were made by a defendant in good faith or in the belief that they were true, he could not be found guilty of fraud.

Accordingly, we can hardly find that the trial court failed adequately to charge the jury on this issue.

Appellants also press the related point that there was insufficient evidence of fraud to support conviction. The evidence with respect to Caine and Fino, ranging from verbal admissions that the Unitron was "worthless" to discussions of ways to rig a test so as to produce favorable results, is close to overwhelming. And given the fact that after a jury verdict we must view the evidence most favorably to the Government and indulge all per-

missible inferences in its favor United States v. Hall, 346 F. 2d 875, 881-82 (2d Cir.), cert. denied, 382 U. S. 910 (1965), there is sufficient evidence in Ratke's case as well. To begin with, Ratke's position in a three-man, one-product, one-advertisement operation supports an inference of knowledge on his part that the scheme was fraudulent. Likewise, Ratke's rejection of advice to clear the advertisement with the Better Business Bureau because he would "rather not get involved" suggests knowledge of the advertisement's inaccuracies. Finally, Ratke was present when Fino described the Unitron as "worthless" and he was subsequently admonished by a bank officer that the fluid "didn't do any good."

We have considered appellants' other challenges, viz., that the trial court erred in refusing to permit introduction of a patent relative to the Unitron and that it improperly marshalled the evidence for the jury. We find no error in either respect.

Affirmed.

APPENDIX B

Statutes

Fifth Amendment to the Constitution of the United States states:

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offsense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

Sixth Amendment to the Constitution of the United States states:

AMENDMENT 6

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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SUPREME COURT, U. S.

FILED
JUL 26 1971

No. 70-205

In the Supreme Court of the United States

OCTOBER TERM, 1971

MONROE CAINE, ET AL., PETITIONERS

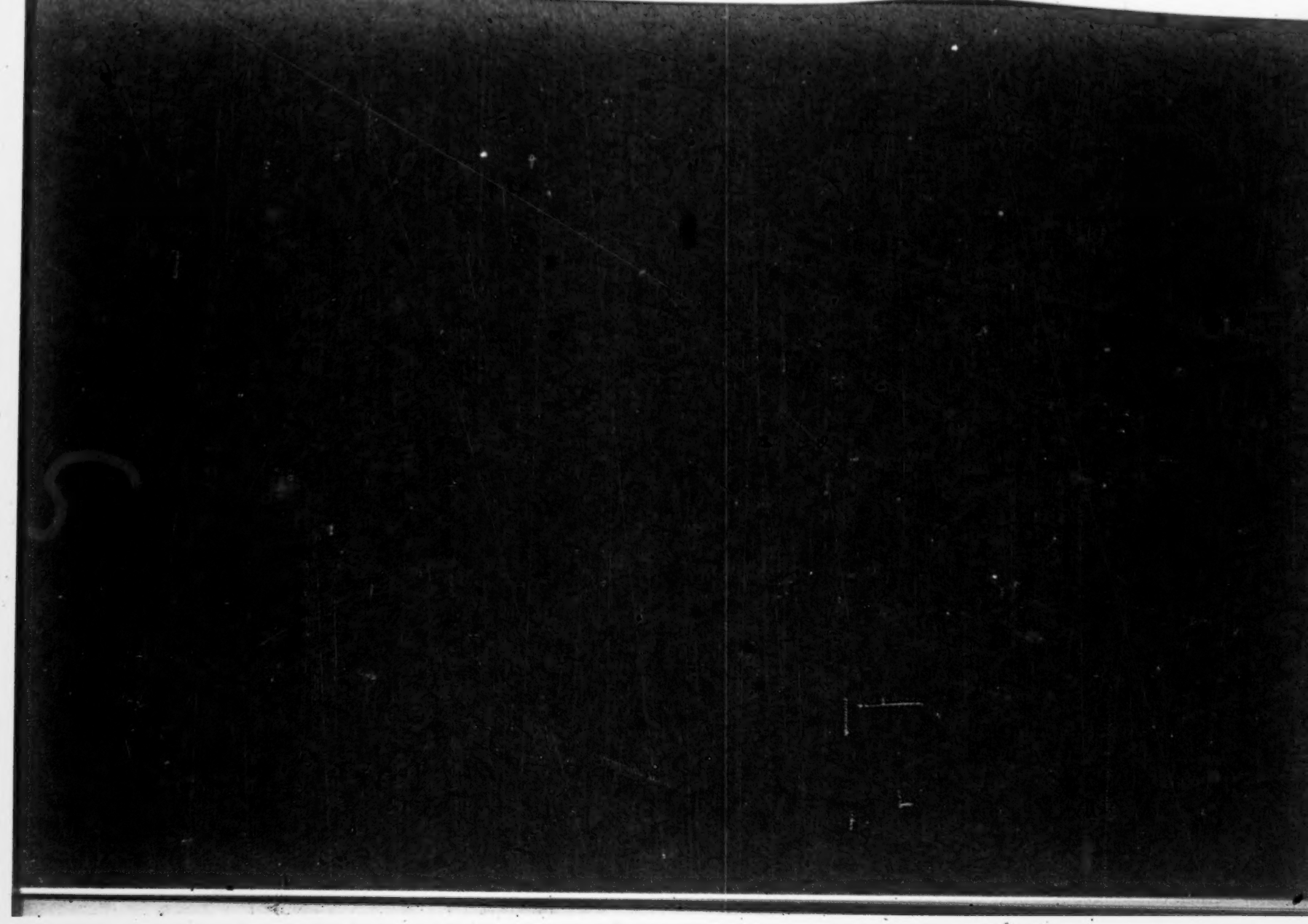
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-205

MONROE CAINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were found guilty upon 72 counts of an 85-count indictment (App. 7-16) charging them with using interstate wire facilities and the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 and 1343. Petitioners Caine and Ratke were sentenced to concurrent four-year terms of imprisonment on each count and fined $2,000 plus one-

third of the prosecution costs. Petitioner Fino was sentenced to concurrent one-year terms of imprisonment on each count and fined $1,000 plus one-third of the prosecution costs. The court of appeals affirmed (Pet. App. A).

The facts are not in dispute and are summarized in the opinion of the court of appeals. The evidence shows that petitioners had formed the Sperry Dynamics Corporation in order to market the "Sperry Unitron," an alleged gas-saving device for automobiles. This device was advertised on a massive scale, with many false claims being advanced. For example, the advertisements referred to Unitron as a new invention by one of America's leading scientists, when, in fact, it was the product of a relatively unknown inventor who worked out of his garage. Unitron was also described as a device to "install" or "insert" in the automobile engine; no disclosure was made that it was actually a six-ounce can of engine detergent to be added to the fuel supply at the rate of one ounce for every five gallons of gasoline. It was further advertised that tests had proved that the device would enable the customer to get up to 33 to 37 miles per gallon (App. 171-172); the falseness of this claim was established both by the results of tests (App. 78) and by the testimony of purchasers to the effect that the "device" provided absolutely no increase in gas mileage (App. 84). Another aspect of the scheme was the failure to ship the product after cashing the purchasers' checks. In addition, many claims for refunds (which were offered in the advertising material) were ignored. During Sperry's

two-year operation, petitioners grossed more than $1,300,000 on this $4.95 item (App. 171).

The first count of the indictment, in a four and one-half page introduction, detailed the scheme. It alleged that the petitioners devised a scheme to defraud for the purpose of obtaining money by means of false pretenses and that as a part of the scheme petitioners would solicit sales of Unitrons by means of advertising. It was further alleged that this advertising contained false, fraudulent and misleading statements, "including among others" twelve listed false claims in the advertising (App. 8-9); this list did not include the false claim that petitioners would give refunds.

1. Petitioners' primary complaint is that the government improperly went beyond the charges contained in the indictment by introducing evidence of fraudulent misrepresentations regarding the refunds. This claim is without merit. The gravamen of the charged offense is the devising of a scheme to defraud —not the making of a false statement. Under such a charge the government need not allege in the indictment every false representation contained in the advertising. *United States* v. *Brunet*, 227 F. Supp. 766, 771 (W.D. Wis.). See *United States* v. *Sprinkle*, 57 F. 2d 968, 969 (C.A. 2); *United States* v. *Caine*, 270 F. Supp. 801, 803, 804, 806 (S.D.N.Y.); *United States* v. *Pilnick*, 267 F. Supp. 791, 795, 801 (S.D. N.Y.).[1]

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[1] The trial judge ruled in the present case that the advertisement's fraudulent promise to pay refunds was properly

2. As pointed out in the opinion of the court of appeals, the claim that the petitioners were taken by surprise by the evidence concerning refunds is insubstantial (see Pet. App. A4-A5). Defense counsel was furnished a copy of the subject advertisement one year prior to trial (App. 58).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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raised by the allegation that "said advertising" contained false and fraudulent representations other than the twelve listed items (App. 36-55).

Petitioners' reliance on *United States* v. *Varner*, 283 F. 2d 900 (C.A. 7), and *United States* v. *Pope*, 189 F. Supp. 12 (S.D.N.Y.), is misplaced. Neither is a mail fraud case. Moreover, this case lacks the danger of surprise involved in *Pope* and the possibility of conviction on charges or theories not underlying the indictment present in both *Varner* and *Pope*.

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